United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

75-1251

To be argued by LAUREN S. KAHN

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

BERNARD TOLKOW, APPELLANT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1251

UNITED STATES OF AMERICA, APPELLEE

v.

BERNARD TOLKOW, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the evidence was sufficient to support the conviction for concealing and failing to disclose a material fact in reports required by the Welfare and Pension Plans Disclosure Act in violation of 18 U.S.C. 1027.

2. Whether the court properly charged the jury.

3. Whether the indictment was void and subject to dismissal on the ground that attorneys of the Justice Department's Organized Crime Strike Force presented the case to the grand jury.

STATUTE INVOLVED

18 U.S.C. 1027 provided:[1/]

> Whoever, in any document required by the Welfare and Pension Plans Disclosure Act (as amended from time

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1/ The statute was amended in 1974. See Public Law 93-406, which became effective on September 2, 1974, 88 Stat. 851.

to time) to be published or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be published or any information required by such Act to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, defendant, business manager of Amalgamated Local 355, Secretary-Treasurer and trustee of its United Welfare Fund, and trustee and administrator of the Fund's Security Division, was convicted on four counts of a twelve count indictment with knowingly concealing and failing to disclose, in reports for the years 1969, 1970, 1971, and 1972, required by the Welfare and Pensions Plans Disclosure Act (29 U.S.C. 304),[2/] the fact of "fund loans in Part 4 Section D of the annual report (party-in-interest) to corporations controlled by Robert W. Wendell in which [defendant] had an interest"

2/ The Welfare and Pensions Plans Disclosure Act was replaced in 1974 by the Employee Retirement Income Security Act of 1974. Pub L. 93-406, 88 Stat. 851. Section 111(a)(1) of Pub L. 93-406 provides that the superceded act would continue to apply to all conduct which occurred before January 1, 1975. The new statute contains similar disclosure provisions. See generally, sections 101-111, 401-501.

(18 U.S.C. 1027). He was acquitted of six counts which charged that on particular times during the years 1969 through 1972, appellant received kickbacks of from $1,000 to $25,000 [3] from Robert W. Wendell and others for the granting of loans by the United Welfare Fund, Security Division, to companies which included Salonga Properties Inc., Salonga Homes Inc., Salonga Enterprises Inc. and Dow Development Corporation. He was also acquitted on one count of operating the affairs of a fund through a pattern of rackeetering activity. [4] Defendant was sentenced to concurrent eighteen month terms of imprisonment, all but six months of which were to be served on probation. He was also sentenced to pay a fine of $5,000.

1. The Welfare and Pension Plans Disclosure Act requires annual reports which include disclosures of certain transactions of a "party-in-interest" which is defined to include any administrator, officer or trustee of a welfare or pension plan, and any officer or employee of an employee organization having members covered by such a plan, 29 U.S.C. 302, 306(f)(1)(C) and 306(f)(1)(D). Defendant, a trustee, administrator and treasurer

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3/ The $25,000 kickback, it was charged, was part of an agreement to pay appellant $96,000.

4/ An additional kickback count was dismissed at the close of the government's case.

of the United Welfare Fund's Security Division signed its reports (D-2 reports) for the years 1969, 1970, 1971 and 1972. Each annual report in its Part IV, Section D, Table 3, did not list any loans to the defendant or to corporations controlled by Robert W. Wendell in which, as we show below, the defendant had an interest (Tr. 88-94;[5] G. Ex. 2, 3, 4, 5; G. App.72,75,78,81).[6]

2. The evidence showed that Robert W. Wendell and Alfred P. Fassnacht were in the business of building homes, that their business was conducted through a group of corporations including Salonga Properties, Salonga Homes, and Brightwaters Associates and that their corporations received a series of loans from the United Welfare Fund, Security Division (Tr. 379-386).[7] By the end of 1968 or early 1969, after receiving Security

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5/ "Tr." designates the transcript of the trial in the district court from March 19, 1975 to March 31, 1975. The balance of the separately paginated transcript is designated by date. E.g. "1 Apr. Tr. refers to the transcript of April 1, 1975. References to the appendix of the defendant and government are designated respectively, "D. App." and "G. App."

6/ The other two tables contained in Part IV, Section D, also did not report that the defendant had any investments in any of the Wendell corporations and did not report that defendant received any fees or commissions incidental to the purchase or sale of investment in securities or properties of the defendant.

7/ The United Welfare Fund was formed to provide health and welfare benefits to members of Amalgated Local 355, a union which represented workers in the fuel oil,automotive,and other industries. The Security Division was formed to accumulate sums of money for union members when they left the union, whether by retirement or otherwise (Tr. 86; G. Ex. 1). Money was contributed monthly to both funds by employers; contributions to each were separately bargained for by Local 355 (afternoon 8 Apr. Tr. 25-27).

Division loans amounting to $700,000, Wendell and Fassnacht were in poor financial condition (Tr. 386-387). Early in 1969 the two began negotiating with defendant for another loan (Tr. 177-178). In connection with the negotiations Wendell and Fassnacht met with defendant, and on February 24, 1969, Salonga Properties and Salonga Homes received a mortgage loan from the Security Division (Tr. 177-181, 387-395; G. Ex. 16, 17).

In April 1969 defendant told Wendell and Fassnacht that he thought he had a group of businessmen interested in investing $100,000 in Salonga Homes and Salonga Properties in return for a 50 percent interest in everything Wendell and Fassnacht owned then or might build in the future (G. App. 1 - 2). Defendant stated "that he didn't want his name with these men connected in any way [sic], shape or form. . ." (G. App. 3). Following defendant's suggestion, it was agreed that the money be placed in Brightwaters Associates, a corporation which had never borrowed money from the Security Division, (G. App. 3 - 4). Defendant stated that he would obtain the money from the investors in a few weeks (G. App. 4).

During the same month defendant suggested a real estate venture to labor relations consultant Murray Portnoy through which Portnoy could realize a capital gain, a venture which was not to be a real investment, but would appear on Portnoy's books as such (G. App. 43-47).

On April 11, 1969, defendant brought Wendell and Fassnacht to Portnoy's office and Portnoy wrote a $10,000 check to Brightwaters Associates. The same day or the following day, defendant gave Portnoy $10,000 (Tr. 409-415; G. App.47-50 ; G. Ex. 54-55).

Also on April 11, 1969, defendant gave Fassnacht and Wendell $17,800 in other monies (Tr. 412-417; G. Ex. 56, 57). In return Fassnacht gave receipts on behalf of Brightwaters Associates to the defendant in the name of Herbert Kadison for $5,000 and Hyman Gechter for $12,800 (Tr. 416-417; G. Ex. 56, 57).

Thereafter, defendant on five occasions in April and May, 1969, gave Wendell 8/ a total of $47,200 and received receipts on behalf of Brightwater Associates to Hyman Gechter for $37,200 and to Herbert Kadison for $10,000 (Tr. 417-422, 435-440; G. Ex. 58, 59, 62). In April 1969, defendant also gave Portnoy $5,000 in cash for another of his checks and turned over the check to Wendell who in turn wrote a receipt to Portnoy (Tr. 433-435; G. App.50-51 ; G. Ex. 60, 61).

Since only $80,000 of the promised $100,000 had at that time materialized, Wendell asked defendant for the remaining $20,000 (Tr. 441). Defendant replied that the investors wanted their money secured with land (Tr. 442). As a result Wendell had a deed prepared to property in the names of Portnoy, Gechter

8/ Fassnacht died in a plane crash in April 1969.

and Kadison in exchange for the remaining $20,000 (Tr. 443; G. Ex. 65). Defendant never gave Wendell the remaining $20,000 (See Tr. 467).

In August and October 1970, the Security Division made four mortgage loans to Wendell's corporations. Before the loans were made, defendant asked for and received checks in the amounts of $3,000, $3,000, $2,000, and $10,000 on the claim that Portnoy, Gechter and Herbert Kadison were anxious to begin receiving money on their $80,000 investment (Tr. 467). Two of these checks were made payable to Herbert Kadison and were endorsed by the defendant over to himself. The other two checks were made payable to Herbert Kadison's wife Rhoda who on one occasion endorsed the check to the defendant. The other check, after endorsement by an unknown person was deposited by defendant's wife. (Tr. 467-480, 495-496; G. Ex. 19, 20, 72-76).

During the fall of 1970, defendant instructed Wendell to write an agreement whereby Wendell could buy out the $80,000 investment for $120,000, and backdate the agreement to July 10, 1969, the same day as the deed Wendell made out to Portnoy, Kadison and Gechter, (Tr. 442-443, 496-498). Wendell did as instructed and signed the agreement; to Wendell's knowledge it was never signed by the other parties (Tr. 498-499, 501-503; G. Ex. 77).

In November 1970, when the Security Division again made a mortgage loan to one of Wendell's corporations, defendant again asked and received more money on the $80,000 investment, a $3,000 check payable to Rhoda Kadison (Tr. 504-506, G. Ex. 24, 78). Rhoda Kadison's signature was signed by defendant who then endorsed the check over to himself (G. App. 33-34 ; 7 Apr. Tr. 4, 80;[9/] afternoon 8 Apr. Tr. 78). Thereafter when Wendell received loans from the Security Division he was required by defendant to return $3,000 per mortgage on the Portnoy, Kadison and Gechter investment. Wendell did this, as defendant directed, by writing checks to Rhoda Kadison. From November 4, 1970, to February 11, 1971, Wendell wrote $30,000 in these checks, which together with the checks previously written to Rhoda or Herbert Kadison, totalled $48,000.[10/] As to four of the checks, defendant signed Rhoda Kadison's name and endorsed the check over to himself (G. Ex. 79, 80, 82, 83);[11/] two of the checks were not signed

9/ There are two volumes of transcripts in the government's possession dated April 7, 1975. One contains only the testimony of one Murray Portnoy. The more complete volume contains Portnoy's testimony and other matters. Our citations are to the more complete volume which is not paginated in order. We have paginated that volume, starting with the cover page as page 1, for a total of 128 pages, and use those page numbers in our citations.

10/ After January 19, 1971, defendant required that the payments be increased to $4,000 per mortgage loan (Tr. 518-521).

11/ Rhoda Kadison testified that as to G. Ex. 80 she told defendant not to "bother" her with the checks and to endorse her name and deposit it (G. App. 34-35).

but merely stamped with defendant's name (G. Ex. 80, 84). All of the Security Division mortgage loan checks to Wendell's corporations which resulted in these Kadison checks were signed by defendant (See e.g. Tr. 506-524; morning 1 Apr. Tr. 32-34; 7 Apr. Tr. 4, 80; afternoon 8 Apr. Tr. 78-79; G. Ex. 22, 25, 26, 27, 29, 30).[12/]

Wendell and his Salonga corporation continued to receive loans from the Security Division in the first part of 1971 (Tr. 538-544; G. Ex. 92). Eventually defendant reminded Wendell that he still had not bought out the $80,000 investment for $120,000 as stipulated in the backdated July 10, 1969, agreement. Wendell said that he would try to sell the property that he had previously deeded to Portnoy, Gechter and Kadison (Tr. 543-544). He prepared a document deeding the property back to himself which he gave to the defendant who in turn returned it to Wendell with the purported required signatures (Tr. 544-545; G. Ex. 93).[13/]

12/ In addition to the checks given to defendant payable to Portnoy, Kadison and Gechter, the evidence also showed that defendant received cash fees, or kickbacks, from Wendell as a condition precedent to the receipt of Security Divisions loans (Tr. 182-183, 187-198, 251-252, 262-269, 387-405, 444-450, 455-476, 561-570, 581-588; afternoon 1 Apr. Tr. 22-38, 4-5).

13/ Portnoy signed the document at defendant's request (G. App. 53-55). Defendant's attempt to record the deed proved futile as only one of Gechter's two daughters and heirs, Alice Tolkow had signed it (Tr. 547-548). A second deed was subsequently prepared by Wendell at defendant's direction (Tr. 547-548). It was signed by the Kadisons and Alice Tolkow (Tr. 549; G. Ex. 94). Portnoy refused to sign the second deed as he did not want his name linked with Alice Tolkow's (G. App. 55-57). A deed to which (Footnote cont'd.)

In 1970, Wendell also received a $45,000 second mortgage loan for Harbor Planning, a corporation belonging to his wife, from the Security Division. This loan was repaid in three months (Tr. 382, 444-449, 455; G. Ex. 66). On November 30, 1970, defendant invested $35,000 in Harbor Planning, acquired 50 percent of its shares, and was made its secretary (Tr. 525-534; G. Ex. 85, 88, 89). About April 1971, defendant called Wendell and asked him if the Security Division had loaned money to Harbor Planning (Tr. 534). When Wendell replied that it had, defendant stated that there "could possibly be a conflict of interest" and he wanted to be bought out (Tr. 534-535). On April 30, 1971, both Wendell and defendant signed an agreement whereby defendant agreed to be bought out for $90,000 (Tr. 535-538, G. Ex. 90, 91). Defendant then resigned as secretary of the corporation (Tr. 538).

In late Spring 1971, when Wendell again asked defendant for building loans, defendant told him he would have to repay prior loans and pay $6,000 per mortgage on the $80,000 investment (Tr. 564-565). The payment arrangement was written down

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13/ (Footnote cont'd.)
Portnoy's name was signed by defendant was also prepared (Tr. 551-554; 7 Apr. Tr. 3-4, 79; G. Ex. 95). Both deeds were recorded on November 8, 1971 (Tr. 549-554; G. Ex. 95). Wendell was never able to sell the property.

by defendant; it listed $6,000 "per house cash to B. T." (Tr. 566-568; 7 Apr. Tr. 3-4, 79-80; afternoon 8 Apr. Tr. 101-106). After agreeing to defendant's terms, Wendell received six mortgage loans from the Security Division in June and July 1971 (Tr. 568-572; G. Ex. 97, 100, 101, 102). On June 11, 1971, Wendell wrote two $6,000 checks to Rhoda Kadison and gave them to defendant (Tr. 573-574; G. Ex. 98, 99). Herbert Kadison endorsed his wife's name to both checks and deposited them; he then wrote a check to defendant for $10,000 (G. App. 13-14 ; G. Ex. 98, 99).

Subsequently Wendell told defendant he would be unable to pay anymore on the $80,000 investment and would attempt to get the money from other property (Tr. 574). He was unable to do this and on January 21, 1972 he turned over 100 percent of his stock in all corporations owned by him to his attorney Warren Ralph (Tr. 578-579). Ralph formed a new corporation, Salonga Enterprises, of which he was president, to act as a holding corporation for the others (afternoon 1 Apr. Tr. 12). After subsequent Security Division investments Salonga Enterprises eventually went bankrupt (Tr. 579-598). At the time of the collapse defendant told Ralph he wanted the records of the transactions between the enterprises and the Security Division destroyed; he further stated that "if you guys . . . give me any trouble I'll have you killed" (afternoon 1 Apr. Tr. 42-43). Additionally Wendell testified that defendant told him,

"[y]ou tell Ralph I will bury him or anybody else who tries to give me the business" (Tr. 597).

Neither Wendell nor his partner Fassnacht ever met either Herbert Kadison or Hyman Gechter (Tr. 416-417). Kadison testified that he was not familiar with any of the corporations owned by Wendell and had never invested money in them (G. App. 6 - 7). In her testimony Rhoda Kadison stated that she had not heard of any of Wendell's corporations until she was called before the grand jury. She was not, furthermore, familiar with Wendell, Fassnacht or Portnoy, and never gave money to any of them. She said that she signed G. Ex. 76, the $10,000 check, after defendand and his wife, her brother-in-law and sister, told her that the checks were the result of an investment made long ago by her deceased father, Hyman Gechter, 14/ and since she had received the bulk of her father's estate, she felt the Tolkows should have this money (G. App. 28-32). 15/

14/ Hyman Gechter died in January 1970.

15/ After the grand jury investigation began, defendant urged Portnoy, if he were called, to testify that his investment was legitimate and that his money was still in Brightwaters Associates (G. App. 62-63). Defendant then explained his theory to Portnoy that the money had been left to his wife through a will and suggested Portnoy proceed with that theory (G. App. 66-67). After receiving a subpoena Portnoy called defendant and told him he was thinking of exercising his Fifth Amendment privilege (G. App. 67). Defendant commented that the grand jury would grant Portnoy immunity and "climb all over him" (G. App. 67). Subsequent to Portnoy's grand jury appearance, defendant called Portnoy twice. On the second occasion defendant told Portnoy
(Footnote cont'd.)

3. Defendant testified on his own behalf (afternoon 8 Apr. Tr. 3-27, 34-124a; 9 Apr. Tr. 3-166). He presented the theory that all the Portnoy, Kadison and Gechter moneys constituted bona fide loans, and that the Kadison checks were the result of Gechter's investment (afternoon 8 Apr. Tr. 61-84; 9 Apr. Tr. 52-85). He claimed that he did not read the D-2 reports prior to signing them, that they had been prepared by the accountant, and that neither he nor any member of his family had party-in-interest loans from the Security Division during the periods in question (afternoon 8 Apr. Tr. 53-54; 9 Apr. Tr. 35-39). Defendant denied trying to influence Portnoy's grand jury testimony (afternoon 8 Apr. Tr. 84-88). He admitted investing money in Harbor Planning, claiming that at the time of his investment he was not aware of prior Security Division loans to that entity (afternoon 8 Apr. Tr. 88-94; 9 Apr. Tr. 109-127). He further denied making threats to Warren Ralph (afternoon 8 Apr. Tr. 120-124).[16/] Defendant also introduced evidence to show that he was in the hospital in January 1969, when, according to Wendell, one of

15/ (Footnote cont'd.)
that "he hoped I [Portnoy] was smart enought not to . . . [bad rap the union] because he thought that he could do me more harm than I could do him" (G. App. 68-70).

16/ See also the testimony of Albert Gallo (morning 8 Apr. Tr. 20-21, 31-34, 37).

the early meetings between Fassnacht and Wendell and defendant concerning Brightwaters took place (7 Apr. Tr. 122-125; morning 8 Apr. 3-6; afternoon 8 Apr. Tr. 58-61). Additionally, defendant presented a number of character witnesses.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION

The Welfare and Pension Plans Disclosure Act (29 U.S.C. 301 et seq.), the statute that requires the filing of the reports involved in this case, created a statutory scheme designed to protect the "interests of participants in employee welfare and pension benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto." 29 U.S.C. 301(b). Congress in this legislation intended that the required reports would help curb the many abuses that had occurred in the administration of the funds. See H. Rep. No. 998, 87th Cong. 2nd Sess. (1962), 1962 U. S. Cong. and Admin. News 1532, 1537-1539, 1547; S. Rep. No. 1440, 85th Cong. 2nd. Sess. (1958), 1958 U.S. Cong. and Admin. News 4137, 4139-4140, 4145-4147, 4153-4154, 4162-4165. We submit that the defendant's conduct, as shown by this record, displays a type of abuse that Congress meant to curtail by this legislation. There is substantial proof, contrary to defendant's contention, both that he had an

interest in the Brightwaters transaction and that he had knowledge of the contents of the information set forth in Part 4 Section D of the reports required by the Act. 17/

As detailed in the statement, the proof showed that defendant acquired a fifty percent interest in all of the Wendell enterprises in April and May 1969 by placing $80,000 in Brightwaters Associates under the names of Herbert Kadison (his wife's brother-in-law), Hyman Gechter (his brother-in-law), and Murray Portnoy (a labor relations consultant). 18/ Both Portnoy and the Kadisons testified that they never invested any money in either corporation. Indeed the Kadisons testified that they did not know Wendell and were not familiar with his corporations. And Portnoy testified that he merely gave defendants checks for cash and that Brightwaters was not a real

17/ The evidence, of course, must be examined in the light most favorable to the government. See Hamling v. United States, 418 U.S. 87, 124 (1974); United States v. Brill, 350 F.2d 171, 173-174 (2nd Cir. 1965), cert. den. sub nom. Scalza v. United States and Hyman v. United States, 382 U.S. 973; United States v. Brown, 335 F.2d 170, 172 (2nd Cir. 1964).

18/ Defendant misreads the indictment when he alleges that the evidence failed to show that he had an interest in Brightwaters Associates and Harbor Planning at the time the Security Division made loans to those corporations and therefore his conviction must be reversed. The indictment charged defendant not with failure to report as party-in-interest loans, loans to Brightwaters and Harbor Planning but "to corporations controlled by Robert W. Wendell" (see e.g. D. App. 1a).

investment for him. Beyond this, the defendant received almost all the money from this investment. 19/ Had the investment been legitimately his in-law's, as defendant contends, there would have been no need for him to endorse checks for his in-laws. By using this method defendant was simply attempting to launder his own investment. 20/

Nor is defendant exonerated from criminal responsibility either by his claim that he was unaware of the contents of the reports or by the fact that the false reports were prepared by an accountant, Irving Gruber. 21/ Defendant signed the reports in his role as an administrator of the plan and it is well

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19/ Herbert Kadison at one point endorsed his wife's name to two checks totalling of $12,000 and apparently was able to retain $2,000 of the money (G. App. 13-14 ; G. Ex. 98, 99). The remainder of the $60,000 in checks to the Kadisons went directly to defendant, a fact he does not deny. The only money that Portnoy received was the cash from the defendant in exchange for his checks.

20/ The court did not charge that the Brightwaters investment was simply "an investment of non-union funds on behalf of relatives of the defendant and one Murray Portnoy". It also charged that there is "evidence tending to show that the defendant was the actor throughout in arranging for the contribution of the money and its eventual repayment by Wendell and subsequently Warren Ralph". (D. App. 6a). Finally, the court told the jury that "one of the issues of fact you have to decide is whether the Brightwaters investment was an investment on the part of the defendant or on the part of other people, Gechter, Portnoy, and you understand that you have to decide that" (D. App. 9a).

21/ Gruber testified that he prepared the reports from the books and records of the fund (Tr. 315) and that he had no recollection of any conversations with defendant about party-in-interest transactions (Tr. 325).

settled that a signature at the bottom of a return is "prima facie evidence that the signer knows the contents of the return". See e.g. United States v. Romanow, 505 F.2d 813, 814 (1st Cir. 1974); United States v. Harper, 458 F.2d 891, 894-895 (7th Cir. 1971), cert. den., 406 U.S. 930. This principle, has been applied to annual financial reports filed by labor unions, United States v. Bath, 504 F.2d 456, 460 (10th Cir. 1974), and should likewise be applicable here.

Moreover, there was circumstantial evidence that indicated the defendant was aware of the requirements of disclosure contained in the reports. In the first place, as detailed above, he used nominees to hide his interest in Wendell's corporations. Second, in April 1969 he suggested that the investment be placed in Brightwaters Associates, a corporation that had never borrowed money from the Security Division (G. App. 1-3). Third, in April 1971, defendant asked Wendell if the Security Division had loaned money to Harbor Planning (Tr. 534).22/

22/ In addition, the government adduced testimony that the trustees of the fund had been criticized by the State Insurance Commission for making loans to contributing fuel oil employers (Tr. 295). Such loans were reflected as party-in-interest loans in D-2 annual reports signed by the defendant. In his own behalf, defendant testified that such loans were discontinued because they were illegal. Significantly defendant did not testify that he did not know of the reporting requirements.

Insofar as defendant relies on the fact that the reports were prepared by an accountant, this does not constitute a defense to the instant charge. Such a defense could only be available if defendant had made a full disclosure of his dealings to the accountant. See e.g. United States v. Oates, 467 F.2d 129, 132 (3rd Cir. 1972), cert. den., 410 U.S. 909.

In short, there was substantial evidence which showed that defendant was a recipient of Security Divisions loans because of his joint venture with Wendell resulting from his acquisition of fifty percent interest in all of the Wendell enterprises and that his failure to list the loans in the annual reports that he signed constituted a failure to disclose a material fact in the reports as charged in the indictment. 23/

II

THE TRIAL COURT"S CHARGE WAS PROPER

A. The record shows that the court gave the following instruction concerning the credibility of the defendant as a witness rather then the instruction quoted at pp. 16-17 of the defendant's brief (14 Apr. Tr. 38-39): 24/

23/ The loans were required to be listed in the reports whether they are classified as direct or indirect loans, cf. United States v. Lanni, 466 F.2d 1102 (3rd Cir. 1972); United States v. Pecora, 484 F.2d 1289, 1294 (3rd Cir. 1973).

24/ An instruction identical to the one of which the defendant complains was suggested by the government in its Request to Charge No. 27.

Now, the defendant himself has taken the stand in this case and testified in his own behalf. Obviously he has a deep, personal interest in the result of his prosecution.

Indeed, it is fair to say he has the greatest stake in its outcome.

Interest creates a motive for false testimony; the greater the interest the stronger the motive, and a defendant's interest in the result of his trial is of a character possessed by no other witness.

In appraising his credibility, you may take that fact into consideration. <u>However, it is by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful, candid and straight-forward story</u>.

It is for you to decide what extent, if at all, his interest has affected or colored his testimony [Emphasis added].

The court also charged the jury extensively on the credibility of the government witnesses. The jury was instructed that key government witnesses were, if they were to be believed, accomplices, and that their testimony was "to be received with caution and weighed with care" (14 Apr. Tr. 35). They were also instructed that since Wendell, Ralph, Eltman and Portnoy received immunity in exchange for their testimony, that immunity grant might have affected their credibility (14 Apr. Tr. 36). 25/

25/ The full instruction read as follows (14 Apr. Tr. 35-36):

You have heard certain testimony here offered by Mr. Wendell, Mr. Warren Ralph, Mr. Alexander Eltman and Mr. Murray Portnoy. They have in their testimony indicated certain dealings each of them had with the defendant or with others. You are free to accept that testimony, and if accepted by you, consider each of

(Footnote cont'd.)

An instruction similar to the one given in this case concerning the credibility of the defendant was upheld by this Court in United States v. Mahler, 363 F.2d 673, 678 (2nd Cir. 1966). As in Mahler the court here did not single defendant out as the only one whose self-interest was such that his testimony should be weighed with care. In such circumstances it is clearly proper to give such an instruction. United States v. Tyers, 487 F.2d 828, 831 (2nd Cir. 1973), cert. den., 416 U.S. 971. See also Reagan v. United States, 157 U.S. 301, 310 (1895); United

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25/ cont'd.
these witnesses as an accomplice in the commission of one or more crimes.

An accomplice is one who joins another in the commission of a crime voluntarily and with common purpose. An accomplice does not become incompetent as a witness because of his participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essentials elements [sic] of any count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to sustain a verdict of guilty without corroboration in or support of other evidence. Yet bear in mind that accomplice testimony is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt.

Now, all four of the witnesses I have named also indicated that they had received a grant of immunity from the Government. I remind you, all evidence of a witness whose self-interest is shown to be such as might tend to prompt testimony unfavorable to the accused should be considered with caution and weighed with great care. Thus you may consider whether the testimony of Eltman, Wendell, Ralph or Portnoy, that they have been granted immunity by the Government affects the credibility of their testimony here.

States v. Sullivan, 329 F.2d 755, 756-757 (2nd Cir. 1965), cert. den., 337 U.S. 1005; United States v. Paccione, 224 F.2d 801, 803 (2nd Cir. 1955), cert. den., 350 U.S. 801; United States v. Jacobo-Gil, 474 F.2d 1213, 1215-1216 (9th Cir. 1973). 26/

B. The court correctly charged the jury on the meaning of the word "knowing" in the statute, giving the substance of a charge requested by the defendant.

Defendant gave the court his requested instruction no. 30 which read in pertinent part as follows:

> Before you can find the defendant guilty of the offenses charged in Counts IX, X, XI, and XII of the

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26/ United States v. Howard, 433 F.2d 505, 512 (D.C. Cir. 1970), cited by petitioner, is inapposite here. In Howard, in dicta, the court of appeals held that any gratuitous suggestion or implication that defendant was more likely to lie than other witnesses was to be avoided. The court, however, did not reverse the defendant's conviction. Likewise, in United States v. Saletko, 452 F.2d 193, 197-198 (7th Cir. 1971) and Taylor v. United States, 390 F.2d 278, 284-285 (8th Cir. 1968), while the Seventh and Eighth Circuits expressed reservations about self-interest instructions which singled out the defendant for special treatment they refused to reverse the defendants' convictions. Here, there is no such problem since the jury was warned not only of defendant's self-interest but also of the interest of the government's key witnesses. Moreover, the jury was additionally told, in reference to defendant, "simply because a person has a vital interest in the end result" does not mean "that he is not capable of telling a truthful, candid and straightforward story." See also United States v. Brown, 453 F.2d 100, 107 (8th Cir. 1971) cert. den., 405 U.S. 878; United States v. Jansen, 475 F.2d 312, 319 (7th Cir. 1973), cert. den., 414 U.S. 826.

Indictment [failure to report the party-in-interest loans on the D-2's], you must find beyond a reasonable doubt that all the following elements are present:

* * * *

3. That the defendant in the Annual Reports of the United Welfare Fund, Security Division (D-2) knowingly concealed, convered up or failed to disclose the fact of . . . [his] interest in corporations controlled by Wendell.

4. That the defendant knew that he was required to disclose the existence of such loans in the D-2 Reports.

5. An act is done "knowingly" if done voluntarily, and intentionally; but an act is not done "knowingly" if done because of mistake or accident or by virtue of some other innocent reason.

Bear in mind that is not a violation of law to have such investments. The violation is in the willful failure to report those investments as to which a report is required.

During the charge the judge discussed the kickback counts, of which defendant was ultimately acquitted; in defining "knowingly" he stated as follows (14 Apr. Tr. 14-15):

> What do I mean by "knowingly"? An act is done knowingly if it is done voluntarily and purposefully and not because of any mistake, accident, negligence or some other innocent reason.
>
> You will note that the defendant must have acted not only knowingly but also "because of or with intent to be influenced" by the sum of money or thing of value solicited or received. Those words simply mean that in considering a request for a loan and in reaching a decision to grant it, the defendant acted with the motive of expectation of financial gain or other benefits to himself.

In connection with the racketeering count, of which defendant

was also acquitted, the court charged (14 Apr. Tr. 24-25):

> . . . the Government has charged that defendant acted "unlawfully, wilfully and knowingly." As I have already indicated, all that means is the defendant's conduct be done deliberately and voluntarily. It is not conduct resulting from inadvertance, mistake, or accident. An act is done wilfully if it is done knowingly and deliberately. Wilfull[sic] does not mean that the defendant, in addition to knowing what he is doing, must also suppose he is breaking the law.

The court then continued the charge as quoted in defendant's appendix (Def. App. 4a, 5a, 7a-8a):

> Before you can find the defendant guilty of the offenses charged in Counts 9, 10, 11 and 12 of the indictment, you must find beyond a reasonable doubt that all of the following elements have been established:
>
> * * * *
>
> 3. That during the time periods covered by the Annual Report submitted, there were loans made or outstanding by the Security Division to corporations controlled by Robert Wendell in which the defendant had an interest.
>
> 4. That at the times the defendant signed and submitted the Annual Reports to the United States Department of Labor he knowingly failed to disclose in such reports the existence of such facts.
>
> * * * *
>
> As I have said twice before, the word "knowingly", as used in the crimes charged means that the act was done voluntarily and purposely and not because of mistake or accident. However, you must bear in mind, that knowledge may be proven by defendant's conduct and by all the facts and circumstances appearing from the evidence. No person may intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.
>
> Knowledge and intent exist in the mind. Since it

is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

Contrary to defendant's contention (Br. 13), the jury was clearly told that it must find that defendant had knowledge and that negligence was not enough for a conviction. The contention that the jury instructions left the impression that it was not necessary for the jury to conclude "that the defendant knew that he was required to disclose the existence of such loans in the D-2 reports" in order to convict him is rebutted by the precise language of the charge which stated that "'knowingly', as used in the crimes charged means that the act was done voluntarily and purposely and not because of mistake or accident", see p. 23 , supra. Obviously, to 'knowingly' fail to disclose, as charged by the court, defendant had to know he was required to disclose. Indeed the court could have gone further and charged the jury that it could have convicted the defendant if he acted in reckless disregard of the law's requirement. See United States v. Ottley, 509 F.2d 667, 672 (2nd Cir. 1975). 27/

27/ We note further that that defense counsel, although he did except to some parts of the charge, made no exceptions with respect to the court's charge on "knowing". There was no need (Footnote cont'd.)

C. The claim that there was error in the instructions concerning Harbor Planning should be rejected.

The court in its instructions charged the jury as follows:

> You will, of course, have to be satisfied beyond a reasonable doubt as to your determinations on the question of the defendant's interest, for if you are not, then you must acquit him on the third group of counts. If you do find beyond a reasonable doubt that the defendant did have an interest and that the corporations in question were the beneficiaries of loans from the Security Division, then you will have to determine whether or not the defendant knowingly failed to disclose his interest in these transactions and that their omission on the D-2 Reports was not inadvertant or mistaken.

Thereafter the court instructed the jury concerning the Brightwaters investment and the Harbor Planning investment (D. App. 6a-7a). Defendant at no time objected to these instructions.

Subsequently during its deliberations, the jury asked the court in a written question, "what period of time did Mr. Tolkow become a partner in Harbor Planning, Brightwaters Estate?" (See Court Ex. 4). The judge, since he was unsure just what the jury

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27/ cont'd.
for him to do so since the court in substance had given defendant's requested charge. He should not, therefore, be allowed to object to the absence of particular wording now. United States v. Jackson, 390 F.2d 317, 319 (2nd Cir. 1968), cert. den., 392 U.S. 936; United States v. Kelly, 349 F.2d 720, 759-760 (2nd Cir. 1965), cert. den., 384 U.S. 947; United States v. Mullins, 325 F.2d 145, 146 (2nd Cir. 1963); United States v. Fromen, 265 F.2d 702, 707-708 (2nd Cir. 1959) cert. den., 360 U.S. 909.

required, questioned the jurors. At the sidebar Raymond Bergan, defense counsel, reminded the judge:

> I had asked you [the judge] in chambers to remind the jury that with respect to Brightwaters, whether it was an investment, something they have to decide with respect to Harbor Planning, whether or not a loan after investment, had to be reported.

The court then instructed the jurors (Br. App. 9a):

> I assume you have in mind that one of the issues of fact you have to decide is whether Brightwaters investment was an investment on the part of the defendant or on the part of other people, Gechter, Portnoy, and you understand that you have to decide that. Secondly, with respect to Harbor Planning, you have to decide whether at the time that the defendant entered into that transaction, he was aware of any loan that had been made in the past, or whether there was a loan in fact, at the time. You understand that?

Again defense counsel did not object to this instruction. There

There was no error in the instruction. Defendant's guilt or innocence did not depend upon whether there was a particular Security Division loan outstanding to a particular corporation at the time the reports were filed but rather whether he had a substantial financial interest which made him a beneficiary of Security Division loans, and required that the loans be listed on its reports. This issue rested,as the court below charged, on whether defendant had in fact an investment in Wendell's corporations. The fact that a loan to Harbor Planning was not outstanding was thus immaterial to his guilt or innocence.

III

THE ATTORNEYS OF THE DEPARTMENT OF JUSTICE ORGANIZED CRIME STRIKE FORCE WERE LAWFULLY AUTHORIZED TO APPEAR BEFORE THE GRAND JURY WHICH INDICTED DEFENDANT.

Prior to trial defendant moved to dismiss the indictment on the grounds that the Special Attorneys who took part in the presentation of defendant's case to the grand jury were improperly authorized to do so. In opposition the government presented "appointment letters" for the special attorneys involved in the proceedings. The motion was properly denied. This court in its opinion in In re Persico, slip op. 4129 (2nd Cir. June 19, 1975) rejected an identical argument. United States v. Crispino, 392 F. Supp. 764 (S.D.N.Y. 1975), cited by petitioner as authority, was recently reversed by this Court, 517 F.2d 1395 (June 30, 1975); see also In re DiBella, slip op. 4665 (2nd Cir. July 8, 1975). The Eighth Circuit, the only other circuit which has considered the issue has likewise rejected petitioner's contention, United States v. Wrigley, No. 75-1235 (8th Cir. July 18, 1975), petition for certiorari filed August 18, 1975, No. 75-1235; United States v. Agrusa, No. 75-1196 (8th Cir. July 18, 1975); DiGirlomo v. United States, No. 75-1286, (8th Cir. July 18, 1975), petition for certiorari filed September 23, 1975, No. 75-463.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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